IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM SMALLWOOD, et al.	
Plaintiffs,	
v.	**CASE NUMBER: 1:15-cv-336**
BANK OF AMERICA, N.A.,	**JUDGE: Susan J. Dlott**
Defendants.	

PLAINTIFFS WILLIAM SMALLWOOD AND GOLDA SMALLWOOD'S MEMORANDUM CONTRA TO BANK OF AMERICA N.A.'S MOTION TO DISMISS THE COMPLAINT

I. INTRODUCTION.

Defendant Bank of America, N.A. ("BANA") admittedly failed and refused to respond to Plaintiffs William and Golda Smallwood's ("Smallwoods") three (3) qualified written requests ("QWRs") regarding BANA's evaluation and denial of their loan modification applications as mandated by the Real Estate Settlement Procedures Act ("RESPA").

RESPA requires BANA to take specific actions in response to QWRs in order to provide BANA's customers greater access to information about their loans. What BANA proposes in its Motion to Dismiss ("MTD") would effectively construct a wall between servicers and their customers where Congress intended a bridge of shared information. BANA cannot hide behind its self-serving and restrictive reading of RESPA. Because BANA's interpretations of RESPA conflicts with binding authority and all of the legal analysis stated herein, BANA's MTD must be denied and this case resolved on its merits.

II. BACKGROUND.

The Smallwoods spent two (2) years attempting to obtain a loan modification from BANA. BANA mishandled the applications, lost documents, improperly denied their applications and erred in denying their appeals (Complaint ¶ 20-48). The Smallwoods sent three (3) QWRs which described why the Smallwoods believed their mortgage loan account and the evaluation of their loan modification applications were in error and made specific requests for information concerning BANA's actions in connection with servicing the loan which includes loss mitigation (Complaint ¶ 2, 49-110, Exhibits "G", "K", "Q"). BANA not only erred in denying the loan modification applications, it failed and refused to properly respond to the QWRs. Federal law requires BANA to specifically explain why their loss mitigation applications and appeals were denied with copies of the documents relied thereon. These are the facts which are taken to be true. Accordingly, the Complaint states a cause of action upon which relief can be granted and BANA's MTD must be denied.

II. LEGAL STANDARD.

> The Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted". To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint must comply with the pleading requirements of Federal Rule of Civil Procedure 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). When considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must construe the complaint in light most favorable to the plaintiff and accept the factual allegations as true. *Lambert v. Hartman*, 517 F3.d 433, 439 (6th Cir. 2008).

Cooper v. Fay Servicing, LLC, S.D. Ohio No. CR 1:15-cv-100 (July 17, 2015)

When evaluating a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court construes the complaint in the light most favorable to the plaintiff, accepts its allegations as true, and draws all reasonable inferences in favor of the plaintiff. *Kinslow v. Third Federal Bank, Inc.*, No. 12-6183, 2013 WL 3113136, *2 (6th Cir. June 21, 2013), citing *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 456 (6th Cir. 2011). "A motion to dismiss under Rule 12(b)(6) is disfavored and rarely granted." *Nuchols v. Berrong*, 141 F. Appx. 451, 453 (6th Cir. 2005).

A plaintiff must provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007). The allegations must raise a right to relief above the speculative level. *Id.* at 1964-65. However, Fed.R.Civ.P. 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus*, 550 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007). Specific facts are not necessary. *Id.* The statement need only give the defendant fair notice of the claim and its grounds. *Id.*, citing *Twombly*, 127 S.Ct. at 1964. In this case, the Smallwoods' Complaint sets forth fair notice and the grounds that BANA committed numerous violations of RESPA by failing to properly respond to the Smallwoods' three (3) QWRs.

Taking the Smallwoods' well-pled allegations as true, they stated a claim upon which the Court may grant them relief. The Court should deny BANA's Motion to Dismiss. The Smallwoods have satisfied their burden under the Federal Rules and have given BANA notice of their valid claims.

V. ANALYSIS.

A. RESPA GOVERNS LOSS MITIGATION PROCEDURES.

Under RESPA, loss mitigation procedures directly relate to the servicing of a borrower's mortgage loan. RESPA requires servicers to act as follows:

1. Maintain policies and procedures at 12 C.F.R. §1024.40(a);

2. Assign personnel to a delinquent borrower at 12 C.F.R. §1024.40(a)(1);

3. Make available to a delinquent borrower personnel to respond to borrower inquiries and assist in providing loss mitigation options at 12 C.F.R. §1024.40(a)(2);

4. Provide the borrower with accurate and timely loss mitigation options at 12 C.F.R. §1024.40(b)(1) & (1)(i);

5. Explain the procedures a borrower must take to be evaluated for loss mitigation options at 12 C.F.R. §1024.40(b)(1)(ii);

6. Retrieve records in a timely manner at 12 C.F.R. §1024.40(b)(2) et. seq.;

7. Explain how to send a QWR by providing a delinquent borrower with information about the procedures for submitting a notice of error pursuant to 12 C.F.R. §1024.35 or an information request pursuant to 12 C.F.R. §1024.36 at 12 C.F.R. §1024.40(b)(4); and

8. Follow the loss mitigation procedures set forth in § 12 C.F.R. §1024.41 et. seq.;

Pursuant to the above, Congress expressed its clear intent that loss mitigation is an act of servicing and is governed by the mandates of RESPA.

B. LOSS MITIGATION IS AN ACT OF SERVICING.

The Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.*, ("RESPA") is a consumer protection statute that was originally limited to the negotiation and execution of mortgage contracts but expanded in scope in 1990 to encompass loan servicing. *Marais v. Chase Home Finance, LLC,* 736 F.3d 711, 719 (2013), citing *Medrano v. Flagstar Bank, FSB*, 704 F.3d 661, 665–66 (9th Cir.2012); *see also Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 679 (7th Cir. 2011); *McLean v. GMAC Mortg. Corp.*, 398 Fed. Appx. 467 (11th Cir. 2010). "Remedial statutes should be construed broadly to extend their coverage and their exclusions or exceptions should be construed narrowly." *In re Carter*, 553 F.3d 979, 986 (6th Cir. 2009) citing *Cobb v. Contract Transport Inc.*, 452 F.3d 543, 559 (6th Cir. 2006). Congress expressly intended

RESPA to provide borrowers with "greater and more timely information on the nature and costs of the settlement process." 12 U.S.C. 2601(a); *see also Vega v. First Federal Sav. & Loan Ass'n of Detroit*, 622 F.2d 918, 923 (6th Cir. 1980).

In this case, BANA invites this Court to apply a draconian and overly narrow reading of RESPA which contradicts RESPA's consumer-protection purpose. Specifically, BANA hopes the Court will find that a servicer's processing of loss mitigation applications from borrowers whose loans it services is somehow not related to servicing. However, given the purposes of RESPA and the appropriate reading of the statute, BANA's arguments fail on two major fronts. First, the processing of loss mitigation applications is related to servicing as defined within RESPA, and RESPA allows for inquiries about loss mitigation procedures. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1990 (2015), quoting *Maracich v. Spears*, 133 S. Ct. 2191, 2200, 186 L. Ed. 2d 275 (2013) (where the Court notes that the plain meaning of "relates to" is so broad as to encompass nearly everything and that a court should look to the objectives of the underlying statute to determine the extent of the phrase). Second, the language in RESPA, "relating to servicing" only appears in subsection 12 U.S.C. 2605(e)(1)(A) dealing with a servicer's notice of receipt of inquiry regarding a QWR and not its general duty to respond under 12 U.S.C. 2605(e)(2) et. seq.

BANA attempted and failed to retroactively explain away its RESPA violations. BANA cites as its primary authority the case of *Van Egmond v. Wells Fargo Home Mortg*. 2012 WL 1033281 (C.D. Cal. Mar. 21, 2012). *Van Egmond* is not binding upon this court, is distinguishable from the case at bar, and pre-dates the rule changes that took effect on January 10, 2014. The binding authority is the RESPA statute and supporting regulations. No reading of RESPA absolves BANA of its failure to adequately respond to the Smallwoods QWRs.

RESPA defines QWRs to be any written correspondence which identifies the borrower(s) and their account number and either notifies the servicer of an error or requests other information. 12 U.S.C. 2605(e)(1)(B)(i)-(ii). For notices of error, a borrower must supply "a statement of the reasons for the belief of the borrower, to the extent applicable that the account is in error." 12 U.S.C. 2605(e)(1)(B)(ii). For requests for information, a borrower must supply "sufficient detail to the servicer." *Id.* In this case, BANA admits the Smallwoods' letters are QWRs and admits that the Smallwoods provided specific inquiries concerning their belief that their account was in error and described the documentary information requested (MTD pgs. 3, 4, 5, 6, & 7). RESPA's plain language simply does not allow for BANA to avoid responsibility for its failure to respond substantively to what it admits are valid QWRs.

Under RESPA, codified at 12 U.S.C. 2605(e)(1) & (2) et. seq., a servicer must respond to a QWR by first acknowledging receipt of the QWR and then, after an investigation, take one of three actions. A servicer may either correct the errors asserted by the borrower in the QWR, explain why it believes no error exists, or explain why the information requested is not available. 12 U.S.C. 2605(e)(2)(A)-(C). The minor phrase to which BANA accords commanding weight and reads incorrectly, "relating to servicing," only applies to a servicer's acknowledgement of a borrower's QWR. When construed as a consumer protection statute, RESPA requires BANA to respond to the Smallwoods three (3) QWRs in their entirety.

Pursuant to 12 U.S.C. 2605(k)(1)(C), "a servicer of a federally related mortgage loan shall not - fail to take timely action to respond to a borrower's requests to [avoid] foreclosure, or other standard servicer's duties." Pursuant to 12 C.F.R. 1024.35(b)(7) Error Resolution Procedures, a category of servicing errors includes the "[f]ailing to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by §1024.39." 12 C.F.R. § 1024.39 sets forth specific requirement that servicers must follow when dealing with a delinquent borrower. Pursuant to 12 C.F.R. 1024.36(f)(iii), the servicer may refuse to comply only if "[t]he information is not directly related to the borrower's mortgage loan account." As 12 C.F.R. 1024.41 contains an entire section on Loss Mitigation Procedures, Congress clearly intended RESPA to cover loan modifications. It is contradictory to state that RESPA applies to loss mitigation procedures but does not apply when the borrower questions the procedures followed by the servicer.

Here, BANA had a duty to respond to the Smallwoods' three QWRs in their entirety because the processing and evaluation of loss mitigation applications is directly related to servicing. BANA acknowledges the validity of the QWRs, its receipt, and its responses. Moreover, it acknowledges that it is the servicer of the Smallwoods' Mortgage Loan and that it evaluated the Smallwoods' loss mitigation applications. In its MTD, BANA also admits that it did not respond to the QWRs in their entirety (MTD pgs. 3, 4, 5, 6, & 7). Instead, BANA relies solely upon its position that loss mitigation has nothing to do with servicing a mortgage loan. However, loss mitigation is part of servicing a mortgage loan and at the very least relates to servicing.

The review of a loss mitigation application by a servicer plainly relates to "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan," 12 U.S.C 2605(i)(3). As here, the Smallwoods submitted their loss mitigation application(s) to their servicer, BANA. BANA received the loss mitigation application and evaluated it to determine whether the Smallwoods qualified for a modification of the payment terms of their mortgage loan. In plain terms, the loss mitigation application was the Smallwoods' way of telling BANA that they were having trouble making the scheduled periodic payments and requesting relief from BANA as the servicer of their loan. The Smallwoods believe that BANA erred in reviewing their application for a loan modification. Had the loan modification been approved, it would have changed the interest rate, loan term, and monthly payment. These actions directly relate to BANA's collection of payments from the Smallwoods and the servicing of their mortgage loan.

Taken to its logical conclusion, BANA's reading of RESPA guts the statute of its purpose. BANA encourages the Court to adopt an impermissibly narrow reading of RESPA which would limit a borrower's access to important information regarding his or her mortgage loan. This is especially worrying where, as here, the servicer is in the best and only position to provide the information and documentation requested. By passing RESPA, Congress intended that borrower's be provided greater and timelier access to information from their servicers. Congress did not intend to extract from RESPA a borrower's right to provide the servicers with a notice of errors and to request information about the processing of loan mitigation applications which are reviewed by servicers as an act of servicing mortgage loans.

RESPA's plain language limits the "relating to servicing" phrase to BANA's duty to acknowledge receipt of the QWR within five days in subsection 12 U.S.C. 2605(e)(1)(A). The phrase, "relating to servicing" appears only in that one subsection of RESPA, the subsection which mandates that servicers provide written acknowledgement of their receipt of QWRs to the borrowers. In contrast, the subchapter dealing with "action with respect to inquiry" mandates one of three actions after a servicer receives any QWR. 12 U.S.C. 2605(e)(2). BANA cannot on the one hand argue a limited reading of RESPA and then attempt to generalize that reading to the entirety of RESPA contrary to its plain language.

Loan Modifications are an integral part of loan servicing. BANA is the servicer of the Smallwoods' mortgage loan. BANA provided loan modification applications to the Smallwoods. The Smallwoods submitted their completed loan modification applications to BANA. BANA allegedly reviewed the Smallwoods' loan modification application. BANA denied the Smallwoods's loan modification application. The Smallwoods appealed the denial of their loan modification application to BANA. BANA denied the appeal. The loan modification applications and appeals were submitted through and at the request of their servicer, BANA. BANA claiming that loss mitigation is not an act of servicing is inane.

In summation, no permissible reading of RESPA absolves BANA from its admitted failures to provide the Smallwoods all of the information they requested in their QWRs, including information about how BANA evaluated the information they provided in seeking a loan modification. Accordingly, BANA's MTD must be denied.

C. SMALLWOODS' QWRS WERE NOT DUPLICATIVE.

BANA cannot claim that it had no duty to respond to the Smallwoods three QWRs because they contained duplicative notices of error and requests for information. First, BANA's assertion is not true. Second, BANA never adequately responded to the Smallwoods' first and second QWRs which render the following QWRs proper. Third, the second two QWRs requested the information missing from BANA's first response and sought the complete responses from BANA to which the Smallwoods were entitled. Finally, BANA had the right, pursuant to 12 C.F.R. 1024.35(g)(i), to inform the Smallwoods that it considered the second and third QWRs as duplicative, but it failed to raise that point in its second and third inadequate responses to the QWRs. While Regulation X provides that a servicer is not required to respond to a QWR which is duplicative and unsupported by new information, a servicer must have fully investigated and responded to the QWR which first asserted the error or requested the information. 12 C.F.R. 1024.35(g)(1)(i), 1024.36(f)(1)(i). Moreover, a servicer who treats a QWR as duplicative and intends not to answer must inform the borrower in writing of such within five days. 12 C.F.R. 1024.35(g)(2), 1024.36(f)(2).[1] Nothing in RESPA or Regulation X bars a borrower from repeating a question that went unanswered in previous QWRs. *See Justice v. Ocwen Loan Servicing*, No. 2:13-CV-165, 2015 WL 235738 at *17 (S.D. Ohio Jan. 16, 2015).

D. BANA VIOLATED RESPA BY FAILING TO ADEQUATELY RESPOND TO EACH OF THE THREE QWRS.

In its MTD, BANA admits that it was placed upon actual notice by the First QWR that the account was in "error because it was improperly underwritten for a loan modification" (MTD pg. 3, Complaint Exhibit "G"). BANA admits that the First QWR specifically inquired "[t]he steps taken of Bank of America to look into my client's concerns that their loan was improperly underwritten for a loan modification" (MTD pg. 4, Complaint Exhibit "G"). BANA admits that it made no effort to respond to the notice of errors or request for information regarding the improperly underwritten loan modification.

In its MTD, BANA admits that it was placed upon actual notice by the Second QWR that the account was in "error because it was improperly underwritten for a loan modification …" (MTD pg. 5, Complaint Exhibit "K"). BANA admits that the Second QWR provided a detailed retrospective of the Smallwoods' frustrated efforts to apply for a loan modification and/or appeal the denial of their application. BANA admits the detailed specific requests for information regarding the inputs, net present value analysis, investigation, and appeal review. BANA admits

[1] This may not have been true for the first QWR sent before the Consumer Financial Protection Bureau took over for the Department of Housing and Urban Development in promulgating Regulation X, but the second two QWRS were sent after the new regulations took effect on January 10, 2015. Regardless, the newer regulations which allow servicers to notify borrowers of its position on certain QWRs are instructive.

that it made no effort to respond to the notice of errors or request for information regarding the improperly underwritten loan modification.

In its MTD, BANA admits that it attempted to respond to the Third QWR beyond the statutory required response date (MTD pg. 7, Complaint Exhibit “Q”). BANA admits that the Third QWR provided a detailed explanation on how BANA failed to properly respond to the Smallwoods’ First and Second QWRs. The Third QWR explained to BANA that the Smallwoods qualified for HAMP modification. By alleging that it properly responded to the Third QWR, BANA admits to violating RESPA by not properly responding to the first two QWRs. BANA admits that it did not perform or was unable to find the results of any net present value analysis. BANA’s response “unable to find” means never performed. BANA alleges it denied the loan modification according to facts and figures, but did not provide the documentation to support that analysis as requested in the Third QWR. Since the Smallwoods demanded documentation as part of the Third QWR and no documents were provided, BANA admits violating RESPA by not properly responding to the Third QWR. The numbers provided by BANA are not consistent with the loan modification application and supporting documentation.

E. SMALLWOODS SUFFERED ACTUAL DAMAGES CAUSED BY BANA’S FAILURE TO PROPERLY RESPOND TO THE QWRS.

It is inane for BANA to aver that the Smallwoods failed to allege damages. BANA’s failures to respond to the Smallwoods three (3) QWRs are the actions that created the damages as alleged in the Complaint (Complaint ¶ 72-74, 95-98, 108, 109, 122-127). Allegations taken as true and stated in the Complaint are sufficient to allege damages. Binding authority is clear; the Smallwoods sufficiently alleged actual damages. *See Marais*, 736 F.3d at 721 (where the Sixth Circuit found that the costs and attorney fees for preparing and sending the QWRs were actual damages).

VI. CONCLUSION.

BANA committed multiple violations of the Real Estate Settlement Procedures Act ("RESPA") codified at 12 U.S.C. § 1201 et. seq. and Regulation X, despite being provided three (3) separate opportunities to properly respond to the Smallwoods' three (3) QWRs.

For the purposes of Defendant's Motion under Civil Rule 12(b)(6) all the well-pled factual allegations in the Smallwoods' Complaint are taken as true. The Smallwoods have stated a valid claim and Defendant's Motion to Dismiss must be denied.

Dated August 13, 2015

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2015, I caused this document to be electronically filed with the Clerk of Courts by using the ECF System, which will send a notice of electronic filing to all parties indicated on the electronic filing receipt, pursuant to Fed.Civ.R.P. 5(b)(3) and Loc.R. 5.2(b):

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